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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DAVID ENRIQUEZ, Defendant and Appellant.	2d Crim. No. B150080 (Super. Ct. No. BA200912) (Los Angeles County)

A jury found David Enriquez guilty of two counts of kidnapping (Pen. Code, § 207)[1], two counts of kidnapping for extortion (§ 209, subd. (a)), and one count of robbery (§ 211) and false imprisonment (§ 237, subd. (a)). The trial court found Enriquez had two prior robbery convictions. The court sentenced Enriquez to a term of 58 years to life. Enriquez appeals his conviction and sentence. We affirm.

FACTS

On December 30, 1999, at 4:00 a.m., Enriquez drove his Honda behind Octavio Valenzuela and flashed his headlights. Valenzuela believed Enriquez was an undercover police officer and pulled over. Enriquez handcuffed Valenzuela, put him in his Honda and drove away. He told Valenzuela he would go

to jail if he did not pay him $100. Valenzuela told him he could obtain the money from his sister. They drove to Valenzuela's sister's house and obtained the money. Enriquez drove Valenzuela back to his car.

On the evening of January 8, 2000, Enriquez approached Raul Fernandez and identified himself as a police officer. Enriquez got into Fernandez's car and ordered him to drive. He directed Fernandez to a dark area where he took Fernandez's wallet and searched his car. He then ordered Fernandez to drive him back to the area where they met. Fernandez later found his wallet in the trunk of his car, but his money was gone.

At approximately 1:00 a.m., Carlos Segovia was waiting at a bus stop. Enriquez got out of his car, placed his hand in his pocket as if he had a weapon, and ordered Segovia into his car. He told Segovia he was a police officer and demanded that Segovia pay a $300 fine. Segovia asked Enriquez to drive him to his home where he had the money. Enriquez drove Segovia home and obtained the money. Enriquez told Segovia he would drive him to a police station. He drove Segovia for a distance and ordered him out of the car. Segovia took Enriquez's license number and contacted the police.

All three victims identified Enriquez in a photographic lineup.

Defense

Enriquez testified in his own defense. He said he is a homosexual prostitute. He had sex with Valenzuela, Fernandez and Segovia for money. Valenzuela refused to pay; Fernandez wanted to have a relationship with Enriquez but Enriquez refused; and Segovia became angry and demanded his money back when Enriquez refused to go with him to do drugs.

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1 All statutory references are to the Penal Code unless otherwise stated.

DISCUSSION

I

Enriquez contends the trial court erred in denying his *Faretta* motion. (*Faretta v. California* (1975) 422 U.S. 806.)

The court appointed counsel for Enriquez on June 30, 2000. Enriquez made a *Marsden* motion on September 28, 2000. (*People v. Marsden* (1970) 2 Cal.3d 118.) He complained he could not communicate with his attorney. The trial court denied the motion stating the problem was that Enriquez would not listen.

On November 1, 2000, the parties announced they were ready for trial. The court set the trial for November 29, 2000. On November 29, defense counsel and the prosecutor stipulated that trial had begun. Enriquez made a second *Marsden* motion complaining that his attorney had failed to do a number of things vital to his defense. After the attorney explained, the trial court denied the motion.

When the court denied the second *Marsden* motion, Enriquez asked if he could represent himself. He said he thought he could do a better job.

The trial court asked if Enriquez would need a continuance. Enriquez said he would need 60 days. When the trial court stated it would not grant a continuance, Enriquez said he would accept 30 days. The trial court said it would not bargain. Enriquez then stated he would represent himself without a continuance. The trial court advised Enriquez that it thought he was "playing games." The court gave Enriquez a form petition to proceed in propria persona and said it would continue with the motion the next day.

When the parties appeared the next day, Enriquez stated he was ready to represent himself, but he needed a 60-day continuance. He said he needed the continuance "to look at my file and review what I got to do, plus I got to subpoena people in, and I got to look at the video [of the crime scene]." Enriquez stated he did not make the motion earlier because he did not know his rights and that his attorney's representation of him has been inadequate. The court stated it did not find the reason for the delay credible.

The court denied the motion stating the case was set for trial, the prosecutor has flown in witnesses from out of state at great expense, and that Enriquez could have requested to represent himself at an earlier time.

A defendant in a criminal proceeding has the right to represent himself. (*Faretta v. California, supra,* 422 U.S. 806.) The right, however, is not absolute. If the motion for self-representation is not made within a reasonable time prior to trial, the court has the discretion to grant or deny the motion. (*People v. Windham* (1977) 19 Cal.3d 121, 128.) In exercising its discretion, the court should consider such factors as the quality of counsel's representation, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion. (*Id*. at p. 129.)

Here Enriquez made the motion for self-representation the day trial was to start. Trial in fact started the next day. The motion was clearly untimely.

In exercising its discretion, the trial court which had previously denied two *Marsden* motions saw nothing wrong with the quality of Enriquez's counsel's representation. The court found the reason for Enriquez's request to represent himself, inadequacy of counsel, not to be credible. Indeed, in light of his two prior meritless *Marsden* motions, the trial court could reasonably conclude Enriquez was "playing games" and was simply trying to obtain an unjustified delay. The court noted Enriquez had since June 30 to make the request and waited until November 29 to do so. Finally, the court found that any continuance would do harm to the administration of justice. The prosecutor had transported witnesses from out of state for the trial.

Enriquez argues that his motion was not based on obtaining a continuance. His argument is unconvincing. It is true that on November 29 Enriquez stated at one point that he would represent himself without a continuance. But when his *Faretta* motion resumed the next day, he again demanded a 60-day continuance. He never withdrew that demand.

II

Enriquez contends the trial court erred in allowing the prosecution to impeach him with two prior robbery convictions.

During trial, the prosecutor asked the court to allow impeachment of Enriquez with a 1985 conviction for sale of PCP and convictions for robbery in 1987 and 1992. Enriquez objected that the robbery convictions were too similar to the charged offenses and should be excluded under Evidence Code section 352. The trial court disallowed the PCP conviction but allowed both robbery convictions. Enriquez admitted the robbery convictions on cross-examination.

Enriquez argues that because the robbery convictions are similar to the offenses for which he was on trial, their probative value is outweighed by their prejudicial effect. He cites *People v. Hoze* (1987) 195 Cal.App.3d 949, 954 for the proposition that when the prior conviction is for the same conduct as that for which the defendant is on trial, the danger is that the jury might conclude the defendant has a propensity to commit such crimes.

Balanced against such a danger, however, is the danger that the exclusion of the prior convictions can give the defendant's testimony a false aura of credibility. No person who elects to testify on his own behalf is entitled to a false aura of credibility. (*People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590.) Enriquez argues that a false aura of credibility could have been avoided by admitting the 1985 conviction for sale of PCP. But evidence of a single older conviction would not give the jury an accurate picture from which to assess Enriquez's credibility.

Enriquez argues that if the prior convictions were to be admitted, they should have been sanitized. He suggested to the trial court that the robbery convictions be described as crimes of moral turpitude. The trial court rejected the suggestion because the term is more misleading to the jury than helpful.

Of course, the jury may be instructed on the meaning of moral turpitude. But even with proper instructions, we agree with the trial court that the

term can be misleading. It invites the jury to speculate on the nature of the prior crimes. It may lead the jury to conclude the defendant has been convicted of crimes too horrible to mention.

The trial court has broad discretion to admit or exclude prior convictions for impeachment purposes. (*People v. Collins* (1986) 42 Cal.3d 378, 389.) Here the trial court did not abuse its discretion.

In any event, even if the trial court erred, the error was harmless. The evidence against Enriquez was overwhelming. Three unrelated victims described similar crimes carried out in a similar manner. All three identified Enriquez. Enriquez's defense did not contain even a semblance of credibility. There is no reasonable probability Enriquez would have obtained a better result had the prior convictions been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Enriquez contends his 58-years-to-life sentence constitutes cruel and unusual punishment.[2] (U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17.) He claims that for all practical purposes it amounts to a sentence of life without the possibility of parole.

Under the California Constitution, a sentence constitutes cruel and unusual punishment if it is so disproportionate to the offense for which it is imposed that it shocks the conscience and offends fundamental notions of human dignity. (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) As an aid in determining whether a sentence constitutes cruel and unusual punishment, we engage in a three-part analysis. First, we examine the nature of the offense and the offender, paying particular attention to the danger each poses to society. Second, we compare the punishment with punishment for more serious crimes in the same jurisdiction.

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[2] Enriquez's sentence was calculated as follows: The court imposed two 25-years-to-life sentences for one count of kidnapping and one count of robbery pursuant to the "Three Strikes" law. (§ 667, subds. (b)-(i).) The court struck prior

Third, we compare the punishment with the punishment imposed for the same offense in other jurisdictions. (*People v. Almodovar* (1987) 190 Cal.App.3d 732, 739-740, citing *In re Lynch* (1972) 8 Cal.3d 410, 425-427.)

Enriquez attempts to minimize the nature of his offenses. But we do not share his benign view of kidnapping and robbery. These are clearly very serious offenses. This is not a case in which Enriquez is being harshly punished for a crime that would ordinarily be a petty offense. (See *Andrade v. Attorney General of State of California* (9th Cir. 2001) 270 F.3d 743, cert. granted sub. nom. *Lockyer v. Andrade* (2002) __ U. S. __ [122 S.Ct. 1434, 152 L.Ed.2d 379].) Nor can we view Enriquez's most recent offenses in isolation. His punishment arises not only from his most recent convictions, but also from two prior robbery convictions.

As to the nature of the offender, Enriquez has a lengthy criminal record. His record includes violent crimes, such as robbery. He has apparently learned nothing from his previous experiences with the criminal justice system.

In an effort to show his sentence is disproportionate to the punishment in the same jurisdiction, Enriquez points to punishment for such crimes as murder. The flaw in his argument is that he is comparing punishment for a single offense with punishment for recidivist behavior. The two cannot be compared. (See *People v. Cooper* (1996) 43 Cal.App.4th 815, 826.)

Enriquez attempts to show that California's punishment for recidivist behavior is harsher than that in other jurisdictions. It may be true that California's law is one of the harshest. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.) But that does not make it unconstitutional. "[C]onstitutional consideration does not require California to march in lockstep with other states in fashioning a penal code." (*Ibid.*) California law is not so disproportionately harsh as to shock the conscience or offend notions of human dignity. The punishment imposed on Enriquez is not cruel and unusual under the California Constitution.

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convictions as to another count of kidnapping and imposed the upper term of eight

Nor does Enriquez's sentence offend the ban on cruel and unusual punishment in the Eighth Amendment to the United States Constitution. In *Solem v. Helm* (1983) 463 U.S. 277, the court held that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." In reviewing sentences under the Eighth Amendment, the court should be guided by such factors as the gravity of the offense and the harshness of the penalty, sentences imposed on other criminals in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions. (*Id*. at p. 292.) These are essentially the same factors we considered in determining that Enriquez's sentence was appropriate under the California Constitution. The federal Constitution requires no different result.

Enriquez cites the concurring opinion of Justice Brennan in *Furman v. Georgia* (1972) 408 U.S. 238, 280, and the concurring opinion of Justice Mosk in *People v. Deloza* (1998) 18 Cal.4th 585, 601-602 for the proposition that punishment is excessive if it serves no penal purpose more effectively than a less severe punishment. But such concurring opinions are not the holding of the court. (See *Del Mar Water, etc. Co. v. Eshleman* (1914) 167 Cal. 666, 682.)

In any event, the Legislature and the trial court must be accorded substantial deference in determining punishment. (*Solem v. Helm*, *supra*, 463 U.S. at p. 290.) Here Enriquez's record shows a 35-year-old man whose adult life has been dedicated to crime, including violent crime. Under the circumstances, we cannot say that his sentence serves no penal purpose more effectively than a less severe punishment.

Finally, Enriquez argues that his sentence was punishment for exercising his constitutional right to trial. He claims that prior to trial the court urged him to accept the prosecution's offer of a determinate 25-year sentence. He

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years. The court stayed the sentences on all other counts pursuant to section 654.

turned down the prosecution's offer. He states the reasonable inference is that his harsher sentence was imposed because he elected to stand trial.

The imposition of a harsher sentence after a defendant has rejected a plea bargain does not, without more, give rise to an inference of vindictive sentencing. (*U. S. v. Morris* (9th Cir. 1987) 827 F.2d 1348, 1352.) Such an inference might arise, however, when the trial court is actively involved in plea bargaining. (*Ibid.*)

Here, during a *Marsden* motion, Enriquez complained that his attorney recommended he accept the prosecutor's offer. The court simply explained that accepting such a bargain may be wise and is not a sign that counsel is incompetent. That is not trial court involvement in plea bargaining. There is nothing in the record to show Enriquez's sentence was vindictive.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Tricia Ann Bigelow, Judge

Superior Court County of Los Angeles

Valencia & Wong and Robert Valencia, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Jennevee H. De Guzman, Deputy Attorneys General, for Plaintiff and Respondent.